BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

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| In Re: | ) | |
| | ) | Docket No. 2004-316-C |
| Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law | ) | |

**BELLSOUTH TELECOMMUNICATIONS, INC.'S**
**REVISED PROPOSED ORDER**

This matter comes before the Public Service Commission of South Carolina ("the Commission") upon a Petition for Emergency Relief ("Petition") submitted by Nuvox Communications, Inc., Xspedius Management Co. of Charleston, LLC, Xspedius Management Co. of Columbia, LLC, Xspedius Management Co. of Greenville, LLC, Xspedius Management Co. of Spartanburg, LLC, KMC Telecom III, LLC, and KMC Telecom V, Inc. (collectively "the Joint Petitioners") on March 2, 2005.[1] The Joint Petitioners ask the Commission to: (1) declare that the transitional provisions of the *Triennial Review Remand Order* ('*TRRO*")[2] issued by the Federal Communications Commission ("FCC") are not self-effectuating but rather are effective only at such time as the Parties' existing interconnection agreements are superseded by the interconnection

[1] This Order also addresses and disposes of the "Emergency Petition" that Amerimex Communications Corp. ("Amerimex") filed on March 4, 2005, the letter ITC^DeltaCom Communications, Inc. submitted to the Commission on February 23, 2005, and the similar letter that Navigator Telecommunications, LLC submitted on March 3, 2005.

[2] In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand*, FCC 04-290 (released February 4, 2005) (*"TRRO")* (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-290A1.pdf).

agreements resulting from their upcoming arbitration docket; and (2) declare that the Abeyance Agreement they entered with BellSouth Telecommunications, Inc. ("BellSouth") requires BellSouth to continue to honor the rates, terms and conditions of the Parties' existing interconnection agreements until such time as those agreements are superseded by the agreements resulting from the upcoming arbitration docket.

## I. PROCEDURAL HISTORY

By Order dated March 4, 2005, the Commission noted that the issues presented by the Joint Petition are matters of law and set oral arguments on these matters on Thursday, March 10, 2005 at 10:00 A.M. This Order further provided that Proposed Orders, either alone or accompanied by briefs, could be filed by the close of business on Tuesday, March 8, 2005. Various parties submitted Briefs and Proposed Orders, and the Commission heard oral argument as scheduled in this Order.

Following the oral argument, Amerimex withdrew its Emergency Petition as moot, explaining that it has entered into a commercial agreement with BellSouth. Subsequently, the Commission invited further briefing and proposed orders from the parties regarding: (1) the impact of the ruling of the United States District Court for the Northern District of Georgia ("the Court's Order")[3] in favor of a preliminary injunction against enforcement of the Georgia PSC's Order addressing the "new adds" provisions of the Federal Communications Commission's ("FCC's") *Triennial Review Remand Order* ("*TRRO*"); and (2) how the Commission should interpret the trend of rulings on this issue from other states and the analyses used. Various parties submitted briefs and/or proposed orders in response to this invitation.

[3] *See* Order, *BellSouth Telecommunications, Inc. v. MCIMetro Access Tranmission Services,* No. 1:05-CV-0674-CC (April 5, 2005).

## II. DISCUSSION

We have carefully reviewed the filings of the parties, the oral argument presented, and the controlling law. Based on this review, we have determined that the FCC's *TRRO* requires that after March 10, 2005, CLECs can no longer order a former UNE from BellSouth and pay the TELRIC rates for that item.[4] Accordingly, the Joint Petition is denied, and to the extent that DeltaCom's letter or Navigator's letter request any relief that is inconsistent with this Order, those requests are denied. The Commission accepts AmeriMex's withdrawal of its Emergency Petition and, accordingly, that Petition is dismissed with prejudice.

At the outset, we note that BellSouth has stated that it "is ready and willing to negotiate, pursuant to section 252 of the federal Act, the transition of the embedded base of existing customers served by network elements that no longer must be unbundled, under the framework adopted by the FCC in the *TRRO*." *See* BellSouth's Brief at 2. We find, therefore, that there is no "emergency" with regard to this transition, because the *TRRO* provides at least one year for the parties to accomplish this transition.[5] We find that the real dispute at this point is whether, after March 10, 2005, the CLECs can order former UNEs from BellSouth and pay the TELRIC rates for those items.

### A. CLAIMS BASED ON THE *TRRO.*

On February 4, 2005, the FCC released its permanent unbundling rules in the *TRRO*. The *TRRO* identified a number of former UNEs for which there is no unbundling obligation under Section 251 of the federal Telecommunications Act of 1996 ("the

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[4] We note that our decision is consistent with the Court's Order and with the conclusions of a significant majority of state Commissions that have decided this issue.

[5] *See TRRO* at ¶¶142, 195, 227. The applicable transition period is one year from some items, and it is longer for others.

federal Act"). Among these former UNEs are switching,[6] high capacity loops in specified central offices,[7] dedicated transport between a number of central offices having certain characteristics,[8] and dark fiber.[9] Recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers ("ILECs") like BellSouth, the FCC adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[10] The FCC clearly said that the transition period for each of these former UNEs -- loops, transport, and switching -- would commence on March 11, 2005.[11] Accordingly, under the framework the FCC adopted, the parties must negotiate, pursuant to section 252 of the federal Act, the transition of the embedded base of existing customers served by network elements that no longer must be unbundled. As noted above, BellSouth states that it is prepared to do this.

While the FCC explicitly discussed how to transition the embedded base of these former UNEs through change of law provisions in existing interconnection agreements, the FCC took a much different approach with regard to the issue of "new adds." For new adds, the FCC's belief "that the impairment framework we adopt is self-effectuating" controls.[12] Instead of requiring ILECs to continue to allow CLECs to order more of the former UNEs during the transition period, the FCC provided that no new adds would be allowed. With regard to switching, for example, the FCC explained that "[t]his transition period shall apply only to the embedded customer base, and does not permit competitive

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6 *TRRO*, ¶199.
7 *TRRO*, ¶¶ 174 (DS3 loops), 178 (DS1 loops).
8 *TRRO*, ¶¶ 126 (DS1 transport), 129 (DS3 transport).
9 *TRRO*, ¶¶ 133 (dark fiber transport), 182 (dark fiber loops).
10 *TRRO*, ¶¶ 142 (transport), 195 (loops), 226 (switching).
11 *TRRO*, ¶¶ 143 (transport), 196 (loops) 227 (switching).
12 *TRRO*, ¶3.

LECs to add new customers using unbundled access to local circuit switching."[13] The FCC continued, finding that "[t]his transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order."[14] The *TRRO* contains similar provisions regarding loops and transport that are no longer subject to unbundling under Section 251 of the federal Act.[15]

The Commission finds that these provisions regarding "new adds" are self-effectuating. The FCC specifically said that "[g]iven the need for prompt action, the requirements set forth here shall take effect on March 11, 2005 . . . ."[16] Additionally, the FCC knew that in many instances, ILECs and CLECs voluntarily have entered commercial arrangements (as opposed to interconnection agreements negotiated or arbitrated under the federal Act) that address items for which there is no section 251 unbundling obligation. The FCC consciously addressed these commercial arrangements, saying that the *TRRO* would not "supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis . . . . "[17] Significantly and conspicuously, there is no similar language addressing existing interconnection

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[13] *TRRO*, ¶199; *see also* 47 C.F.R. §51.319(d)(2)(iii) ("[r]equesting carrier may not obtain new local switching as an unbundled network element."). This new C.F.R. provision is set forth in Appendix B to the *TRRO*.

[14] *TRRO*, ¶227. Footnote 627 addresses the "except as otherwise specified in this Order" clause in Paragraph 227, making it clear that this clause refers to continued access during the transition to items associated with switching – specifically, shared transport, signaling and call-related databases. We find that this clause is not a reference to the change of law process.

[15] S*ee, e.g.,* ¶195, 47 C.F.R. §51.319(e)(2)(ii)(C) & (e)(2)(iii)(C) (transport) and ¶227, 47 C.F.R. §51.319(a)(4)(iii) & (a)(5)(iii)(loops).

[16] *TRRO*, ¶ 235.

[17] *TRRO*, ¶ 199. *See also Id.,* ¶¶148, 198.

agreements – nowhere in the *TRRO* does the FCC say that it does not supersede interconnection agreements that carriers have entered into as required by Sections 251 and 252 of the federal Act. We find that the *TRRO*'s provisions precluding the ordering of "new adds" mean that as of March 11, 2005, CLECs may not order new adds as UNEs under existing interconnection agreements.[18]

In addition to the plain language of the *TRRO*, policy considerations support our decision that CLECs may not order new adds as UNEs after March 10, 2005. The FCC, for instance, explained that it declined to require unbundling of mass market local switching

> based on the investment disincentives that unbundled local circuit switching, and particularly UNE-P, creates. Five years ago, the Commission expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute. Since its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment. Accordingly, consistent with the D.C. Circuit's directive, we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition.[19]

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[18] The Joint Petitioners argue that in Paragraph 233 of the *TRRO*, the FCC states that the "normal section 252 negotiations process applies" with regard to new adds. *See* Petition at pp 10-11, n. 25. Paragraph 233 provides that "carriers must implement changes to the interconnection agreements consistent with our conclusions in this Order." While the Joint Petitioners focus on the interconnection agreement portion of the sentence, we find the "consistent with our conclusions in this Order" clause to be significant. We believe that to be consistent with the conclusions in the Order, the transition plan for the embedded base of UNE-Ps will be implemented via the change of law process, and the prohibition against new UNE-Ps is self-effectuating. The first two sentences of paragraph 233 simply confirm that changes to the interconnection agreement should be consistent with the framework established in the *TRRO,* whether self-effectuating or via change of law.

[19] *TRRO* at ¶218(emphasis added).

Additionally, the FCC has been clear that commercial negotiations can produce pro-competitive and pro-consumer outcomes,[20] and to date, BellSouth has successfully negotiated over 100 commercial agreements with CLECs for the purchase of a wholesale local voice platform service. If we were to adopt the Joint Petitioners' position, progress in this area could come to a halt, at least in the near term. If CLECs know that they can continue adding new unbundled network elements at TELRIC rates until the amendment and arbitration process is completed (which can take up to twelve months under the *TRRO)*, they will have no reason to enter into a commercial agreement at this time.

Significantly, allowing CLECs to continue adding unbundled network elements until the amendment and arbitration process has been completed, even though they are not impaired, unfairly prejudices those carriers that have entered into commercial agreements. As noted above, the *TRRO* does not supersede these commercial agreements.[21] Thus, if CLECs were allowed to order new adds as UNEs after March 10, 2005, carriers that have entered into commercial agreements would be forced to compete for new customers against CLECs that can undercut their prices solely by virtue of these CLECs getting to pay TELRIC rates.

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[20] Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein On Triennial Review Next Steps, March 31, 2004; *see also* FCC Chairman Michael K. Powell's Comments on SBC's Commercial Agreement With Sage Telecom Concerning The Access To Unbundled Network Elements, April 5, 2004 (expressing hope "for further negotiations and contracts - so that America's telephone consumers have the certainty they deserve"); FCC Chairman Michael K. Powell Announces Plans For Local Telephone Competition Rules, June 14, 2004 (strongly encouraging "carriers to find common ground through negotiation" because "[c]ommercial agreements remain the best way for all parties to control their destiny").

[21] *TRRO*, ¶ 199. *See also Id.,* ¶¶148, 198.

Finally, since the courts and the FCC began eliminating BellSouth's obligation to provide items on an unbundled basis, BellSouth has been inviting CLECs to negotiate agreements for the provision of those items on a commercial basis On March 23, 2004, for example, BellSouth issued Carrier Notification SN91084043 that states:

> In light of the [D.C. Circuit's *USTA II*] Order, BellSouth is prepared to offer switching and DS0 loop/switching combinations (including what is currently known as UNE-P) at commercially reasonable and competitive rates. . . . Consistent with the direction provided by FCC Chairman Michael Powell, BellSouth invites your company to enter into good faith negotiations of a market-based commercial agreement aimed at benefiting the end user, establishing stability in the industry and allowing real competition to continue throughout the BellSouth region. Entering into such an agreement will effect an efficient transition from switching under your existing Interconnection Agreement to switching offered on a commercial basis.

In the year since this Notification was issued, more than 100 CLECs have entered into commercial agreements with BellSouth, and BellSouth has recently released another Carrier Notification (SN91085061) reiterating several options involving switching, loops and transport that CLECs can use to serve their new customers. The Commission urges the Joint Petitioners to avail themselves of one or more of these options, as more than 100 CLECs already have done.

## B. CLAIMS BASED ON STATE STATUTES

The Joint Petitioners have suggested that state statutes could be interpreted as allowing them to continue to order new adds as UNEs after March 10, 2005. We reject these suggestions for a number of reasons. First, an order obligating BellSouth to continue to provide new adds after March 10, 2005 under state law would directly conflict with federal law and, therefore, would be preempted. Even if the *TRRO* did not have preemptive effect, any unbundling ordered under Section 58-9-280(C)(3) "shall be

consistent with applicable federal law,"[22] and as explained above, applicable federal law does not allow CLECs to continue ordering new adds as UNEs after March 10, 2005. Moreover, specifically with regard to the various requests to continue ordering "UNE-P" as new adds, Section 58-9-280 does not provide for combinations of network elements – rather, it is limited to "unbundling."[23] Thus, the statute does not provide for the combination of a loop and switching, which is what UNE-P was. Additionally, contrary to the Joint Petitioners' suggestions, the earlier and more general sections 58-3-140, 58-3-170, and 58-9-1080 do not provide the Joint Petitioners with relief that the more recent and more specific Section 58-9-280 does not grant.[24] Finally, this docket addresses how to incorporate certain changes of law into existing interconnection agreements that are subject to section 252 of the federal Act, and BellSouth cannot be required, on the basis of a state law claim, to address new adds (which are not subject to section 251 unbundling obligations) by way of an interconnection agreement.[25]

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[22] S.C. Code Ann. §58-9-280(C). Consistent with this clear statutory directive, the Commission has entered an Order stating that it will implement the unbundling provisions of section 58-9-280 "by concurring with the Federal Telecommunications Act of 1996." *See* Order Implementing Requirements, *In Re: Generic Proceeding to Address Local Competition in the Telecommunications Industry in South Carolina*, Order No. 96-545 in Docket No. 96-018-C at pp. 1-2 (August 9, 1996).

[23] *See* S.C. Code Ann. §58-9-280(C).

[24] *See Duke Power Co. V. South Carolina Pub. Serv. Comm'n*, 326 S.E.2d 395, 399 (S.C. 1985)("Laws giving specific treatment to a given situation take precedence over general laws on the subject, and later legislation takes precedence over earlier laws.").

[25] *See MCI Telecomm. Corp. v. BellSouth Telecom. Corp.*, 298 F.3d 1269, 1274 (11th Cir. 2002)(" If [a state commission] must arbitrate any issue raised by a moving party, then there is effectively no limit on what subjects the incumbent must negotiate. This is contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate. See 47 U.S.C. §§251(b),(c) (setting forth the obligations of all local exchange carriers and incumbent local exchange carriers, respectively))(emphasis added).

## C. CLAIMS BASED ON THE ABEYANCE AGREEMENT

The Joint Petitioners and BellSouth are parties to an Abeyance Agreement that provides, in pertinent part:

> Joint Petitioners seek to withdraw their Petition in order to allow the parties to incorporate the negotiation of those issues precipitated by *USTA II*,[26] as well as to continue to negotiate previously identified issues outstanding between the Joint Petitioners and BellSouth. The Joint Petitioners and BellSouth have agreed that they will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement). The Parties further agree that any subsequent petition for arbitration will be filed within 135 to 160 days of entry of a Commission Order granting this Motion. Additionally, the Parties agree that any new issues added to a subsequent petition for arbitration will be limited to issues that result from the Parties' negotiations relating to *USTA II* and its progeny.[27]

We find that this agreement does not restrict BellSouth's rights under the *TRRO*. The Abeyance Agreement simply provides that the parties will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement).[28] The parties are, in fact, continuing to operate under their current interconnection agreements and, like every party to every other existing interconnection agreement, the Joint Petitioners are no

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[26] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2005)(*"USTA II"*).

[27] *See* Joint Motion to Withdraw Petition for Arbitration, *In the Matter of Joint Petition for Arbitration*, Docket No. 2004-42-C at pp. 2-3, ¶5 (July 16, 2004). The Commission approved this Joint Motion, stating that "[t]he parties are hereby allowed to withdraw their Petition, without prejudice, and under the terms stated in the Joint Motion to Withdraw." *See* Order Granting Joint Motion for Leave to Withdraw, *In the Matter of Joint Petition for Arbitration*, Order No. 2004-472 in Docket No. 2004-42-C at 2 (October 6, 2004).

[28] *See, e.g.*, Petition at ¶29.

longer permitted to order new adds as UNEs pursuant to their current interconnection agreements.

The Joint Petitioners appear to argue that the parties cannot "continue to operate under the Parties' existing interconnection agreements until they are able to move into the arbitrated agreements that result from the upcoming arbitration docket" if the parties amend those agreements to incorporate the *TRRO*. Under this interpretation, the Abeyance Agreement would require that the rates, terms, and conditions of the Joint Petitioners current agreement with BellSouth are frozen from June 30, 2004 until the parties move onto new arbitrated agreements. However, this is not the way the parties have been conducting business under the Abeyance Agreement – as BellSouth notes in its Brief, two of the Joint Petitioners, NewSouth and NuVox, recently filed amendments to their current agreements with BellSouth in Tennessee. This practice and custom of the parties supports our rejection of the Joint Petitioners' arguments.[29]

Finally, we find that adopting the Joint Petitioners' argument would lead to an absurd or unreasonable result as it would require this Commission to find that BellSouth indefinitely agreed to waive contractual rights related to the incorporation of the *TRRO* in the current agreements eight months prior to those changes even being issued. In effect, the Joint Petitioners argue that BellSouth essentially gave up the right to implement those new rules for the Current Agreement even before any party knew what those rules would

[29] *See Carter v. American Fruit Growers, Inc.*, 125 S.E. 641, 643 (S.C. 1924) ("Where the parties to a contract have given it a practical construction by their conduct as by acts in partial performance, such construction is entitled to great, if not controlling, weight in determining its proper interpretation.").

contain. We reject this argument because it impermissibly leads to absurd and unreasonable results.[30]

## III. CONCLUSION

Based on the foregoing, it is hereby ordered that:

1. The Joint Peition is denied.

2. As of March 11, 2005, CLECs like the Joint Petitioners may not place "new add" orders that treat items that are no longer subject to unbundling obligations as UNEs.

3. If a CLEC orders a high-capacity loop or transport UNE from BellSouth after March 11, 2005 and certifies that, based on a reasonably diligent inquiry and to the best of its knowledge, its request is consistent with the applicable requirement of the *TRRO*, BellSouth must immediately process the request. To the extent that BellSouth seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements.

4. To the extent that DeltaCom's letter or Navigator's letter request any relief that is inconsistent with this Order, those requests are denied.

5. AmeriMex's withdrawal of its Emergency Petition is accepted, and its Emergency Petition is dismissed with prejudice.

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[30] *See Holden v. Alice Mfg. Inc., Co.* 452 S.E.2d 628, 631 (S.C. Ct. App. 1994)("A contract should receive sensible and reasonable construction and not such construction as will lead to absurd consequences or unjust results. Where one construction makes the provision unusual or extraordinary and another construction which is equally consistent with the language employed would make it reasonable, fair and just, the latter construction must prevail.").

6. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

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Randy Mitchell, Chairman

ATTEST:

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G. O'Neal Hamilton, Vice-Chairman

(SEAL)

Respectfully submitted,

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